

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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Federal Communications Commission  
Office of the Secretary

In the Matter of )  
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Amendment of Rules Governing ) CC Docket No. 92-26  
Procedures to Be Followed When )  
Formal Complaints Are Filed Against )  
Common Carriers )

COMMENTS

BellSouth Corporation and BellSouth Telecommunications, Inc. ("BellSouth") file these comments in response to the Notice of Proposed Rulemaking issued in the above-referenced matter.<sup>1</sup> The NPRM proposes numerous modifications to rules governing the procedure and disposition of formal complaints filed with the Commission pursuant to Section 208 of the Communications Act, 47 U.S.C. Section 208. The Commission cites their ability to expedite the complaint process as reason for the proposed changes. As detailed below, BellSouth maintains that certain of these proposals would impose undue hardship on litigants, would impede the development of a full administrative record and would ultimately prove counterproductive in attaining the Commission's expressed objectives. Accordingly, these modifications should be rejected. Further, existing rules contain numerous provisions (notably in the area of motion

<sup>1</sup> Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, FCC 92-59, Notice of Proposed Rulemaking, released March 12, 1992 (hereinafter "NPRM").

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practice) which can significantly reduce procedural delays if employed to their full potential.

#### DISCUSSION

One modification proposed by the NPRM would shorten the time for filing Defendant's answer to a formal complaint from the present 30 days to 20 days after service.<sup>2</sup> BellSouth strongly opposes this provision, which would greatly increase the burden on Defendants while doing little to expedite the final disposition of complaints. Unlike the Federal Rules, which contemplate notice pleading and rely heavily on subsequent discovery and a full evidentiary trial to clarify factual and legal issues, Section 1.724, 47 C.F.R. Section 1.724, of the Commission's rules relies on the initial complaint and answer for issue formulation and fact revelation. Section 208 complaints are often factually complex, necessitating considerable investigation by Defendant before a responsive pleading can be prepared. The proposed revision would significantly curtail Defendant's opportunity to investigate factual allegations and evaluate the legal merit of its position. This result would unfairly disadvantage Defendants and in the process would diminish settlement possibilities and impede the compilation of a full and accurate decisional record--consequences which far

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<sup>2</sup> NPRM, para. 8; 47 C.F.R. Section 1.724(a) (proposed).

outweigh any benefit derived from a shortened pleading cycle.

BellSouth does not object to the adoption of specific filing schedules and page limitations for briefs as proposed in paragraph 9 of the NPRM.<sup>3</sup> The Commission should, however, apply uniform requirements to all proceedings without regard to the use (or nonuse) of discovery--a circumstance which is not necessarily indicative of the complexity of issues presented by a case. Moreover, a difference in requirements would be subject to manipulation by either party through the simple expedient of serving interrogatories. Further, the Commission should permit reply briefs in all instances, particularly if a requirement of concurrent filing is adopted. In the absence of a reply cycle, neither party can directly address the merits of the other's argument, thus depriving the Commission of one of the major benefits of the adversary process.<sup>4</sup>

The NPRM also seeks comment on the feasibility of a bifurcated proceeding which would sever the issue of liability from that of damages.<sup>5</sup> Under the proposal litigants would be prohibited from seeking discovery related

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<sup>3</sup> 47 C.F.R. Section 1.732(b)-(f) (proposed).

<sup>4</sup> Alternatively, benefits of the reply cycle can be largely preserved by requiring submission of the complainant's brief followed by submission of Defendant's response.

<sup>5</sup> NPRM, para. 13; 47 C.F.R. Section 1.729(b) (proposed).

to damages absent an order by the Commission establishing Defendant's liability in the action. BellSouth does not support this approach. As a practical matter, liability and damages are not easily severable; many formal complaints present issues of fact and law which are pertinent to both. It would thus prove extremely difficult to permit discovery on liability while prohibiting discovery on damages. One readily foreseeable consequence of such an attempt is the proliferation of disputes between litigants as to whether a given discovery request goes to the issue of liability and is thus permissible or whether it goes to the issue of damages and must therefore be disallowed. These threshold controversies, which would ultimately have to be resolved by the Commission, are more likely to impede than to expedite complaint resolution. Apart from this difficulty, early discovery on the issue of damages can often facilitate settlement, thus serving an important policy objective of the Commission.

Paragraph 14 proposes numerous modifications to the Commission's discovery rules. BellSouth opposes curtailment of the discovery response period for interrogatory answers and document production<sup>6</sup> from 30 days to 20 days as

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<sup>6</sup> The NPRM does not propose to change the existing rule which denies document production except on affirmative order by the Commission. 47 C.F.R. Section 1.730(a). BellSouth likewise does not support expansion of the self-executing discovery now available.

unrealistic and unduly burdensome to litigants.<sup>7</sup> Preparation of a discovery response often requires significant investigation, effort and time by the responding party, its employees and counsel.<sup>8</sup> To shorten the period allowed for this undertaking would only penalize litigants who cooperate in discovery while doing little to advance ultimate resolution of the complaint.<sup>9</sup> In addition, the Commission should retain its current rule allowing all objections to discovery to be made at the time of response. Requiring objections to the breadth of discovery to be filed at a different time introduces an unnecessary complexity to the proceedings.<sup>10</sup> Moreover, it is more efficient for the Commission to issue one ruling dispositive of all objections to a given discovery request; thus no advantage is gained

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<sup>7</sup> 47 C.F.R. Section 1.729(d) (proposed).

<sup>8</sup> To illustrate, in one recent proceeding BellSouth was required to locate and index all documents responsive to the discovery request. The resulting compilation totalled approximately 100 pages and required over 200 manhours to prepare.

<sup>9</sup> Experience gained under the Federal Rules is also instructive. A 1970 amendment, which increased to 30 days the period for filing interrogatory responses, elicited the following comment of the Advisory Committee: "The procedures now provided in Rule 33 seem calculated to encourage objections and court motions. The time periods now allowed for responding to interrogatories--15 days for answers and 10 days for objections--are too short. The Columbia Survey shows that tardy response to interrogatories is common, virtually expected. The same was reported in Speck [citation omitted]. The time pressures tend to encourage objections as a means of gaining time to answer." 28 U.S.C.A. 33 (1970 Amendment, Subdivision (a)).

<sup>10</sup> See 47 C.F.R. Section 1.729(c).

by mandating an earlier filing for objections of a particular type.

BellSouth is also greatly concerned by the proposal to permit rulings by Commission staff on discovery disputes and other interlocutory matters through the vehicle of informal status conferences.<sup>11</sup> Under current rules the Commission's authority to adjudicate Section 208 complaints is delegated only to the Chief of the Common Carrier Bureau and extends only to matters within existing policy and laws.<sup>12</sup> No provision is made for further delegation and none has been proposed in this rulemaking.<sup>13</sup> Further, rulings made on delegated authority as to interlocutory issues are reviewable by the Commission under Section 1.115 of the rules, 47 C.F.R. Section 1.115, and accordingly must be made on the record. This section, in tandem with provisions governing public notice under Section 1.4, 47 C.F.R. Section 1.4, requires release of a document evidencing the decision

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<sup>11</sup> NPRM, para. 14; 47 C.F.R. Sections 1.729(f), 1.733(c) (proposed).

<sup>12</sup> 47 C.F.R. Sections 0.91, 0.291. Adoption of the proposed amendment would arguably vest Commission staff with many of the powers of an administrative law judge without, however, a delegation of authority comparable to that of Section 0.341, 47 C.F.R. Section 0.341, and without benefit of the well-defined procedure which governs actions designated for hearing.

<sup>13</sup> Notwithstanding that the rules for delegation of authority are not subject to amendment in this proceeding, it has been BellSouth's experience that the Chief of the Common Carrier Bureau does not routinely attend status conferences.

and establishes a period of 30 days from the date of release during which the aggrieved party may seek Commission review. These provisions would conflict with the amendment under consideration, which provides for oral rulings to be effective upon issuance. If such a procedure were adopted, parties would be placed in the untenable position of being forced to comply with an oral ruling while awaiting issuance of the written decision which alone triggers their right to seek review.<sup>14</sup>

Under the proposed amendments considerations of due process and basic fairness would be subordinated to the goal of expedience. Moreover, the procedure raises numerous practical difficulties which would impede rather than facilitate complaint resolution. Oral rulings made at a status conference are easily subject to faulty recollection and/or misunderstanding on the part of participants, notwithstanding the requirement that such decisions be promptly reduced to writing. In addition, such impromptu determinations do not afford litigants sufficient opportunity for well reasoned argument and do not afford

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<sup>14</sup> Nor is hardship eliminated if the adverse decision is promptly memorialized in writing. Proposed Section 1.729(f) requires that where an objection to discovery is overruled, respondent must serve requested materials on the movant within 10 days from the date of the status conference or within 20 days from service of the interrogatories, whichever period is longer. Thus, to preserve substantive rights, the losing party must file its application for review and obtain a stay of the order well in advance of the 30-day period established under Section 1.115.

Commission staff sufficient opportunity for deliberation. To the extent different staff members participate in the conferences, inconsistent rulings are virtually assured.

Rather than adopt new procedures, the Common Carrier Bureau should make full use of its existing authority to issue rulings on written motions and oppositions. Reliance on the written record will minimize the problems of misinterpretation and inconsistency noted above. Moreover, in many cases the Bureau's ruling can simply adopt the proposed order of the prevailing party.

In BellSouth's experience, the Bureau has rarely exercised its authority to rule upon motions in formal complaint proceedings. Nevertheless, this authority remains a powerful tool for the prompt and just adjudication of numerous issues, including those related to discovery.<sup>15</sup>

The NPRM has also proposed to eliminate relevance as a legally cognizable basis for objection to discovery.<sup>16</sup> Under this approach refusal to answer an interrogatory or comply with document production<sup>17</sup> on grounds of relevance

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<sup>15</sup> From the NPRM it is unclear whether a dispute regarding discovery could be raised initially at a status conference and decided contemporaneously by the staff or whether the status conference would address only those issues which have been the subject of previous motions and oppositions. If the former, the problems described would be greatly exacerbated; if the latter, the status conference is unnecessary to a decision on the merits and remains a potential source of misunderstanding and inconsistency.

<sup>16</sup> NPRM, para. 15.

<sup>17</sup> See n. 6, supra.



would be deemed an admission of allegations contained in the discovery request. Such a rule, even if legally sustainable, would only serve to encourage abusive discovery tactics and the creative writing of discovery requests.<sup>18</sup> For these reasons, relevance should continue to be recognized as a legitimate basis for objection to discovery (as it is in every other adjudicative forum to BellSouth's knowledge), with the Common Carrier Bureau retaining full power to decide issues predicated on the assertion of this defense.<sup>19</sup>

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<sup>18</sup> For example, in an action to recover alleged overcharges a complainant might ask on discovery how many times the defendant carrier has failed to render timely billing due to inaccuracies of its billing systems. This question, predicated upon unproven facts, is moreover irrelevant to an overcharges complaint. However, under the Commission's proposed rule, an objection based upon relevance would be deemed an admission that billing systems were inaccurate, which could substantially prejudice Defendant's interests in the overcharges proceeding.

<sup>19</sup> Heretofore the Commission has imposed the requirement of relevance to promote disciplined and well-focused discovery and ultimately facilitate adjudication of complaints. "We admonish parties to limit interrogatories to relevant matter and to seek information of a specific nature; wholesale 'fishing' expeditions will not be tolerated. Parties are warned that we will not permit misuse of these procedures and will invoke sanctions for abuse when appropriate." Amendment of Rules Governing Procedures To Be Followed Where Formal Complaints Are Filed Against Common Carriers, CC Docket No. 86-498, 3 FCC Rcd 1806, para. 40 (1988). Nothing has occurred which would support reversal of this position.

CONCLUSION

BellSouth appreciates the opportunity to participate in this proceeding and urges the Commission to adopt rules for the governance of Section 208 proceedings which are consistent with the foregoing comments.

Respectfully submitted,

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April 21, 1992